

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0771

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 23, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit work without good cause and was disqualified from receiving unemployment insurance benefits effective April 24, 2022 (decision # 83648). Claimant filed a timely request for hearing. On June 21, 2022, ALJ Scott conducted a hearing that was continued on July 6, 2022. A Mandarin interpreter assisted with portions of the July 6, 2022 hearing. On July 6, 2022, ALJ Scott issued Order No. 22-UI-197618, modifying decision # 83648 by concluding that claimant was discharged, but not for misconduct, within 15 days prior to a planned voluntary quit without good cause and therefore was disqualified from receiving benefits effective May 8, 2022. On July 9, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant did not declare that she provided a copy of her argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) The Tao of Tea LLC employed claimant from May 1, 2019 until April 29, 2022. For most of the period claimant worked for the employer, she worked as a retail clerk in the employer's tea shop. Claimant worked in the shop on Fridays, Saturdays, Sundays, and half a day on Mondays. A coworker also worked in the tea shop Monday through Friday.

(2) Claimant had a difficult relationship with the coworker. The coworker was unvaccinated against COVID-19, and claimant thought this increased her risk of infection. However, claimant had received her COVID-19 vaccinations (including a booster shot), did not have any medical conditions that made her unusually susceptible to COVID-19, the employer's tea shop used an air filtration system that reduced the risk of COVID-19 transmission to some degree, and claimant only worked with the coworker during a portion of the day once a week. Claimant told the employer's owner about her

discomfort with the coworker being unvaccinated. The owner told claimant he was following applicable COVID-19 guidelines and they did not require workers at retail shops to get vaccinated.

(3) Claimant also believed the coworker declined to switch her weekday shifts for claimant's weekend shifts when claimant requested it due to racial animus she felt toward claimant, who was Asian. Claimant also disagreed with the coworker about politics and disapproved of the candidate the coworker voted for in the 2020 U.S. presidential election. Claimant never raised her allegations of racial bias on the part of the coworker with the owner. If she had done so, the owner would have investigated the matter and, if substantiated, taken appropriate action against the coworker.

(4) Working weekends at the employer's tea shop was inconvenient for claimant for several reasons. First, claimant's parents lived in China and worked during the week, so claimant's weekend shifts made it difficult to call her parents on the weekends when they were not working. Second, claimant had an English tutor who was only available on weekends, so working on the weekends interfered with claimant's ability to see the tutor and improve her English skills. Third, on two consecutive Sunday shifts in early 2022, a customer asked claimant about her ethnicity and tried to engage her in discussions of political topics, which made claimant uncomfortable. Claimant did not mention the customer who made her uncomfortable to the owner.

(5) In late March or early April 2022, an administrative assistant job became available in the employer's office. The employer's owner, aware of claimant's desire to not work weekend shifts, promoted claimant to the administrative assistant position, which only required working on weekdays. The owner premised the promotion on the condition that claimant would have to continue working weekends in the shop until the owner could find someone to replace claimant.

(6) Thereafter, claimant worked in the office on Mondays and Tuesdays and in the shop on Fridays, Saturdays, and Sundays while the owner looked for a replacement worker. On April 29, 2022, after working under this arrangement for about two weeks, claimant sent the owner an email advising of her intent to resign effective May 13, 2022. The reasons for quitting that claimant cited in the email were the coworker's unvaccinated status, that working weekend shifts interfered with her English tutoring, and the uncomfortable interactions claimant had had with the customer earlier in the year. Claimant also decided to quit because she believed the coworker was racially biased against her and claimant disagreed with the coworker's political views.

(7) In her email, claimant stated she did not wish to work on weekends during the two-week notice period and requested switching shifts with the coworker during the two weeks so that the coworker worked weekends and claimant worked weekdays. The owner considered claimant's idea to have the coworker work claimant's weekend shifts during claimant's notice period. However, the coworker was not available to work weekends. Because claimant had announced her intention to resign and did not wish to work her weekend shifts during the two-week notice period, the owner discharged claimant effective the day of her resignation email, April 29, 2022.

CONCLUSIONS AND REASONS: The employer discharged claimant, but not for misconduct, within 15 days of claimant's planned voluntary leaving without good cause.

Discharge. ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. “As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct.” OAR 471-030-0038(3)(a) (September 22, 2020). “[W]antonly negligent’ means indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee.” OAR 471-030-0038(1)(c). In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant on April 29, 2022 because she had announced her intention to resign and did not wish to work her weekend shifts during her two-week notice period. The record fails to show that the employer discharged claimant because she had engaged in conduct the employer considered a willful or wantonly negligent violation of the standards of behavior the employer had the right to expect of her or a disregard of the employer’s interests. Accordingly, the employer did not discharge claimant for misconduct under ORS 657.176(2)(a).

ORS 657.176(8). The analysis continues, however, because it is necessary to assess whether ORS 657.176(8) applies to this case. ORS 657.176(8) states, “For purposes of applying subsection (2) of this section, when an individual has notified an employer that the individual will leave work on a specific date and it is determined that: (a) The voluntary leaving would be for reasons that do not constitute good cause; (b) The employer discharged the individual, but not for misconduct connected with work, prior to the date of the planned voluntary leaving; and (c) The actual discharge occurred no more than 15 days prior to the planned voluntary leaving, then the separation from work shall be adjudicated as if the discharge had not occurred and the planned voluntary leaving had occurred. However, the individual shall be eligible for benefits for the period including the week in which the actual discharge occurred through the week prior to the week of the planned voluntary leaving date.”

The employer discharged claimant, but not for misconduct, on April 29, 2022, which was within 15 days of claimant’s planned quit on May 13, 2022. Therefore, the applicability of ORS 657.176(8) turns on whether claimant’s planned quit was without good cause. “Good cause . . . is such that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would leave work.” OAR 471-030-0038(4). “[T]he reason must be of such gravity that the individual has no reasonable alternative but to leave work.” OAR 471-030-0038(4). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for their employer for an additional period of time.

Claimant’s planned quit was without good cause. Claimant did not establish that her relationship with the coworker presented her with a grave situation. The coworker was unvaccinated against COVID-19. However, claimant did not face a grave situation based on the risk of COVID-19 infection from the coworker because claimant was herself vaccinated against COVID-19, did not have any medical conditions that made her unusually susceptible to COVID-19, the employer’s tea shop used an air filtration system that reduced the risk of COVID-19 transmission to some degree, and claimant only

worked with the coworker during a portion of the day, once a week. Further, claimant did not show that the coworker was racially biased against her or declined to switch shifts with her based on racial animus. Claimant testified that the coworker had been unkind to a Vietnamese customer and held controversial views on certain racially sensitive political matters, such as police violence against African Americans and critical race theory. June 21, 2022 Transcript at 23; July 6, 2022 Transcript at 8. However, claimant did not present evidence that the coworker had ever treated claimant differently because of claimant's race, and it is likely on this record that the reason the coworker did not agree to switch shifts with claimant was simply because she did not wish to work on weekends. Finally, as to claimant's disagreements with the coworker regarding politics, claimant's situation was not of such gravity that the individual has no reasonable alternative but to leave work. Claimant only worked with the coworker a portion of one day per week, and could simply have refrained from discussing political matters with the coworker on that day.

Additionally, claimant did not show that she faced a grave situation because of the fact that she had to work on weekends. Although claimant's weekend shifts made it difficult to call her parents on the weekends when they were not working, claimant testified that it remained possible to find a time to call her parents during the week. June 21, 2022 Transcript at 27. Further, while claimant's weekend shifts interfered with her ability to receive English tutoring, and claimant's desire to improve her English skills was laudable, a reasonable and prudent person would not leave work because their job interfered with their ability to improve their English skills absent some compelling need for improvement of language proficiency.

Finally, while claimant's uncomfortable interactions with the customer who asked her about her ethnicity and tried to engage her in discussions of political topics was concerning, the situation was not grave because claimant acknowledged at hearing that the customer did pose a threat of harm to her. June 21, 2022 Transcript at 17. Moreover, the record shows that as of the time claimant announced her intention to quit, the inconvenience claimant experienced working on the weekends was likely to soon end because the owner intended to transition claimant entirely to weekday work in the office once he found a worker to replace claimant in the shop. Thus, claimant failed to show that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would leave work based on the reasons claimant cited. Therefore, claimant's planned quit was for reasons that do not constitute good cause.

Because the employer discharged claimant, but not for misconduct, within 15 days prior to the date she planned to voluntarily leave work without good cause, ORS 657.176(8) applies to claimant's circumstances. Accordingly, ORS 657.176(8) requires that claimant be disqualified from receiving unemployment insurance benefits effective May 8, 2022. Claimant is not disqualified from receiving benefits for the weeks of April 24, 2022 through May 7, 2022 (weeks 17-22 and 18-22).

DECISION: Order No. 22-UI-197618 is affirmed.

D. Hettle and A. Steger-Bentz;
S. Serres, not participating.

DATE of Service: October 12, 2022

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at courts.oregon.gov. Once on the website, use the ‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

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Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນໍາຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນໍາສານອຸທອນລັດ Oregon ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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